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SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al.,

Petitioners,

Docket No. 2009-019

Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,
Intervenors-Respondents.

**PETITIONERS' RESPONSE BRIEF ADDRESSING AIR QUALITY AND
CULTURAL/HISTORIC ISSUES**

Petitioners respond herein to the post-hearing briefs filed by (1) the Division of Oil, Gas and Mining ("Division") and (2) Alton Coal Development ("ACD") addressing air quality and cultural/ historic issues.

STANDARD OF REVIEW AND BURDEN OF PROOF

The Division's coal permit regulations specify certain elements that must be included in a permit application before it can be approved. UT ADC R645-300-133 ("No permit application . . . will be approved unless the application *affirmatively demonstrates*" that "[t]he application is complete and accurate and the applicant has complied with all the requirements of the State Program." (emphasis added). The job of the Board of Oil, Gas and Mining ("Board") is to ensure that the permit application included the required elements. Here, the evidence presented by Petitioners establishes that required elements related to air quality and cultural/ historic resource review were missing.¹ As a result, the Division's approval of the Coal Hollow Mine permit was unlawful and the Board should remand it.

The Division's coal permit regulations also require the Division to make certain findings before approving a permit. UT R645-300-133. These findings must be supported by evidence in the permit record. *Id.* (prohibits permit approval unless the Division "finds, in writing, on the basis of information set forth in the application or from information otherwise available *that is documented in the approval*" that certain requirements are met) (emphasis added). Here, the evidence presented by Petitioners establishes that certain required findings regarding air quality and cultural/ historic resources were not made and that other findings lacked the necessary support in the

¹ Among other things, Petitioners' *Request for Agency Action and Request for Hearing* (November 18, 2009) alleged that the application and the review by the Division of the Coal Hollow Mine permit was incomplete and inaccurate as it related to air quality and cultural/ historic resources. Pet. Req. for Agency Action at 24-27.

Division's permit files.² As a result, the Division's approval of the Coal Hollow Mine permit was unlawful and the Board should remand it.

Petitioners need not demonstrate as much as ACD suggests. ACD argues, for example, that Petitioners must demonstrate that the Environmental Protection Agency's ("EPA's") Method 9 is inadequate. ACD Br. at 14. This is incorrect. UT ADC R645-300-133 places the burden squarely on the Division to find that the method is adequate and include evidence in the record to support such finding *prior to* approving the permit. Here, the Division itself acknowledged that it lacked the expertise to make such finding. Consequently, the Division's approval of the Coal Hollow Mine permit was unlawful. ACD also incorrectly argues that Petitioners must identify specific cultural resources that will be adversely affected outside the permit area. ACD Br. at 7. Again, the permit regulations place the burden squarely on the applicant and the Division to demonstrate that cultural resources in both the permit area and an identified adjacent area were evaluated. UT ADC R645-103-236; UT ADC R645-300-133; UT ADC R645-301-411.140. Here, the evidence shows that this evaluation was not completed prior to permit approval. Such evidence provides yet another reason why the Division's approval of the Coal Hollow Mine permit was unlawful.

AIR QUALITY

1. The Division was Required to Find that the Fugitive Dust Control Plan Including its Monitoring Program was Adequate.

The mere submittal of a document labeled "Fugitive Dust Control Plan" is not sufficient to satisfy the Division's obligations to find that plan's monitoring program will

² The Division submitted a CD of the documents supporting its approval of the Coal Hollow Mine at the hearing held before the Board on April 29-30, 2010. This CD was marked as exhibit D-1. Exhibits offered and entered as evidence in the hearing held before the Board are indicated by the numbers by which they were marked at the hearing.

“provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed.” UT ADC R645-301-423.100. ACD seems to suggest that simple inclusion in the permit application of something called a “fugitive dust control plan” and “an air monitoring plan” is enough. ACD Br. at 12. *See also* Div. Br. at 3. This ignores the Division’s duty to evaluate the content of the submission and determine that it is adequate. The Division’s regulations require that the monitoring program “provide *sufficient* data to evaluate the effectiveness of the fugitive dust control practices proposed.” UT ADC R645-301-423.100 (emphasis added).

As detailed in Petitioners’ Post-Hearing Brief, the Division acknowledges that it did not find that the monitoring plan would provide sufficient data. Pet. Br. 3. The Division’s regulations unambiguously prohibit the approval of the Coal Hollow Mine without such finding. UT ADC R645-300-133.100 requires that the Division find that “all the requirements of the State Program” are met before approving the permit. The Division did not find that the requirement under UT ADC R645-301-423.100 for a monitoring program to provide sufficient data was met, yet unlawfully approved the permit.

2. The Division’s Refusal to Address the Clarity of the Night Skies was Unlawful.

The Division had no legal excuse for failing to address the concerns raised by the U.S. Forest Service, the National Park Service and numerous Utah residents of the Coal Hollow Mine’s impact on the clarity of the night skies in the area. Protecting visibility – both during the day and at night – is one of the purposes of the required Fugitive Dust Control Plan. UT ADC R645-301-244.100 (“All exposed surface areas will be protected and stabilized to effectively control erosion and air pollution attendant to erosion.”). The

soil particles disturbed by surface coal mining operations can be dispersed in the wind affecting visibility many miles away. The Division's environmental scientist Priscilla

Burton explained the relevance of fugitive dust to visibility:

23 MS. BUCCINO: is it
24 correct that fugitive dust is often dispersed in the wind
25 and it can be carried distances and affect visibility
0116

1 some miles away, is that correct.

2 MS. BURTON: Well, there's different sizes of
3 particles, and different particles get carried different
4 distances. But the fugitive dust control plan pertains
5 to controlling sediment and erosion on open areas, areas
6 that have been cleared within a permit area. So the
7 fugitive dust control plan pertains to controlling
8 material and keeping it on site.

Informal Hearing Transcript *In the Matter of Request for Agency Action and Board Review of the Division's October 19, 2009, Approval of the Application of Alton Coal Development, LLC, to Conduct Surface Coal Mining and Reclamation Operations in Coal Hollow, Kane County, Utah*, [hereafter "Informal Hearing Transcript"] (April 29, 2010), Testimony of Priscilla Burton at 115 ln 23 to 116 ln 8.

The Division's Final Technical Analysis highlighted the need for ACD to address the "effect on the night sky as seen from Bryce Canyon N.P. and the Dixie N.F." Division of Oil, Gas and Mining, *Technical Analysis* (Oct. 15, 2009) [hereafter "*Final TA*"] at 83 [D-3]. The *Final TA* explicitly states that "this deficiency . . . must be addressed prior to receiving a recommendation for approval." *Id.* Yet, the Division went ahead and approved the Coal Hollow Mine permit without any such analysis.³ Such

³ ACD suggests that even if it must address the clarity of the night skies, the Fugitive Dust Control Plan does so. ACD Br. at 17. Again, ACD ignores the plain language of Division's coal permit regulations that require the Division to find in writing that the Fugitive Dust Control Plan is sufficient. Despite the numerous concerns raised about the clarity of the night skies, the Division did not make a finding that ACD's Fugitive Dust Control Plan was sufficient to prevent harm to the clarity of the night skies. Instead,

action not only violates the Division's permit regulations requiring an effective Fugitive Dust Control Plan (UT ADC R645-301-423.200), it also is the essence of arbitrary and capricious action that the Utah Administrative Procedures Act forbids. Utah Code § 63G-4-403.

CULTURAL/ HISTORIC RESOURCES

1. Information Added to Record After Permit Approval Confirms Division's Failure to Complete the Required Evaluation Before Approving the Coal Hollow Mine Permit.

The Division's regulations require that the Division evaluate cultural and historic resources "within the permit and adjacent areas" before a permit application is approved. UT ADC R645-301-411.140. Here, the evidence demonstrates that the Division made its determination of eligibility and effect on November 2, 2007, before two of the inventories of the permit area were completed. The Board's job is to determine whether the Division's approval of the Coal Hollow Mine permit was lawful based on the information before the agency on the date of approval – October 19, 2009. Both the Division and ACD now acknowledge – as they must – that the cultural/ historic resource review as of October 19, 2010, was incomplete. Corrective action taken subsequent to October 19, 2010, is relevant to crafting an appropriate remedy. Such subsequent action, however, does not change the fundamental fact that the Division's approval of the permit on October 19, 2009, was unlawful.

The Division did not address sites identified in the two missing inventories until six months after it approved the Coal Hollow Mine permit. *See* Letter to State Historic Preservation Office ("SHPO") from Daron Haddock (April 21, 2010) [D-21] ("the Division has failed to include two archeological sites in the previous requests for your

the finding that the Division made was that ACD still had failed to address the issue. *Final TA* at 83 [D-8].

concurrence regarding the surveys and mitigation for the Coal Hollow Mine.”). At the hearing before the Board on April 29, 2010, the Division explicitly acknowledged that it had failed to evaluate the complete permit area before approving the permit in October 2009:

15 So Mr. Haddock, did you become aware, after
16 October 15, that there had been a failure to include all
17 the lands that had been identified as part of the permit
18 area in the cultural survey?
19 MR. HADDOCK: Yes.

Informal Hearing Transcript, Testimony of Daron Haddock (April 29, 2010) at 219 lns 15-19.

ACD discovered the failure to address the entire permit area in responding to Petitioners’ challenge to the permit:

15 MR. BAYER: If I could, please. Perhaps I can
16 give the Board some background.
17 In preparing our materials for getting ready for
18 this permit challenge, we actually came across two sites
19 that had either not been properly reported and/or had not
20 been properly concurred with by SHPO, and we self
21 reported those.

Informal Hearing Transcript, Statement of Bennett Bayer, Counsel for ACD (April 29, 2010) at 223 lns 15-21.

The admissions by the Division and ACD establish that the Division’s evaluation of cultural and historic resources was incomplete at the time it approved the Coal Hollow Mine permit and as a result its approval was unlawful. This is the question before the Board. As Chairman Johnson stated at the recent hearing:

23 CHAIRMAN JOHNSON: The question before the Board
24 is whether or not the permit was issued correctly back in
25 October. Okay. So let's move forward.

Informal Hearing Transcript, Statement of Board Chairman Johnson (April 29, 2010) at 233 lns 23-25.

Mitigation of adverse effects may occur after permit approval, but the identification and evaluation of effects may not. ACD argues that mitigation can occur after permit issuance. ACD Br. at 3 (citing UT ADC R645-301-411.144); *see also* Div. Br. at 8. While this is correct, it does not change the fundamental requirement to identify the affected resources and evaluate the potential effects upon them before the permit is approved. The application must contain maps and a supporting narrative “which describe the nature of cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.” UT ADC R645-301-411.140. Here, the permit application lacked a complete evaluation of the permit area and consequently the Division’s approval of it was unlawful.

Having determined that the Division’s approval was unlawful, the Board may then address the appropriate remedy. It may be that the Division has now taken the action necessary to address its unlawful approval of the Coal Hollow Mine permit without a complete cultural/ historic review of the permit area. Petitioners believe that other failures by the Division require a remand of the Coal Hollow Mine permit and therefore the issue of failing to cover the entire permit area should be folded into such remand. In the event that the Board finds no other error in the permit approval and that no further corrective action is needed, the Board may conclude that a remand is not necessary. In this case, Petitioners recommend that the Board find the Division’s

approval of the permit unlawful for failure to evaluate the entire permit area in its cultural/historic resource review.

2. The Division Must Look at Indirect Effects When Evaluating a Proposed Mine's Impact on Cultural/ Historic Resources.

The Division unlawfully ignored the potential indirect effects of the proposed Coal Hollow Mine on cultural and historic resources. Federal regulations include “indirect” effects within the meaning of “effect.” 36 C.F.R. § 800.16(d). The Division’s regulations must be interpreted in a way that is consistent with state and federal statutes. *See* Pet. Br. at 18-19. Regulations implementing the federal Surface Mining Control and Reclamation Act (“SMCRA”) explicitly require that “[s]tates with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act.” 30 C.F.R. § 733.11. Failure to do so could result in invalidation of the state’s coal permitting program. 30 C.F.R. § 733.12 (provides for annual review by Director of Office of Surface Mining, petition for review of state program and withdrawal of approval of state programs).

In an effort to explain away the absence of an identified adjacent area in the permit record, the Division argues that any sites outside the permit area would be avoided. Div. Br. at 12. The rationale the Division now offers to excuse the identification of an adjacent area is that it evaluated sites on the permit boundary and that the portion of the sites located within the permit boundary would be avoided. *Id.* The Division then allegedly concluded that “any site further away and fully outside of the permit area . . . would also be avoided and there was no reason to consider any of the other sites further away.” Div. Br. at 12-13. Nothing in the permit record documents such analysis or determination. Moreover, the problem with this analysis is that several

types of adverse effects could occur even where sites are avoided. Stormwater runoff, for example, could rush off the site as a result of the disturbed surface and wash away a cultural site that was “avoided.” Sights and sounds from the mine site could diminish the integrity of the property’s historic features. *See* 36 C.F.R. § 800.5(a)(2)(ii)(v). Coal trucks leaving the permit area could produce dust and vibrations that could damage historic buildings. The Division views its cultural/ historic resource review obligations too narrowly in simply ensuring that sites will “avoided.”

ACD advances the same unlawfully narrow view of the cultural/ historic resource review. ACD Br. at 6-7. ACD suggests that there was no reason to believe that any cultural or historic site outside the permit area would be affected by the Coal Hollow Mine. ACD Br. at 6. Yet, the Division cannot simply assume that no adverse effects may occur. The Division’s regulations place an affirmative duty on the applicant to submit inventories covering both the permit area and an adjacent area. UT ADC R645-301-411.140. The Division has to make a determination of eligibility and effect for both the permit area and an adjacent area. Here, the Division did not identify any adjacent area in its permit record that it evaluated. The permit record does not document any evaluation of sites completely outside the permit area. Even though inventories had identified the sites outside the permit area that might be potentially affected by the proposed mine, no work was done to evaluate the impacts on sites outside the permit area. *See* Excerpts of Rule 30(b)(6) Deposition of Jody Patterson (Feb. 25, 2010) at 18-19:

- A. Of course, we conducted the inventories in the blue areas as well, but, to my knowledge, we haven’t really addressed any impacts to those sites yet because we don’t know what those impacts are going to be,

and even if they are going to have those leases yet, although they may have been inventoried.⁴

The arguments made by the Division and ACD render the requirement to look at an adjacent area meaningless. ACD argues that “Mr. Haddock’s testimony explained why the Division concluded that sites located entirely beyond the permit boundary were unlikely to be adversely impacted.” ACD Br. at 6. Citing Mr. Haddock’s testimony, ACD goes on to argue that “because surface disturbance must be confined to the permit area, sites located some distance from the permit area will escape any likely effect of ‘coal mining and reclamation operations.’” ACD Br. at 6-7. This cannot be sufficient to satisfy the applicant’s or the Division’s responsibilities under UT ADC R645-301-411.140. According to such rationale, there would never be a need to look beyond the permit area. The plain language of UT ADC R645-301-411.140 requires something more than an evaluation of the permit area alone.

3. Evidence in the Permit Record Demonstrates the Potential Adverse Effects that the Coal Hollow Mine Could Have on the Panguitch National Historic District.

The permit record contains comments from the National Park Service and numerous residents of the Panguitch area regarding the potential adverse effects the Coal

⁴ What Montgomery Archeological Consultants did not do was not done by anyone else. Chris McCourt, ACD Manager, testified in his Rule 30(b)(6) deposition on behalf of ACD that the company did not to his knowledge submit “any information to the Division related to the cultural resource review that was not prepared by Montgomery Archeological Consultants.” Excerpts of Rule 30(b)(6) Deposition of Chris McCourt (Feb. 25, 2010) at 6-7. Division Permit Supervisor Daron Haddock testified at the hearing before the Board that Division staff did not conduct any on the ground archeological work related to the Coal Hollow Mine permit:

17 MS. BUCCINO: In terms of on the ground
18 archeological field work, did the Division staff, itself,
19 conduct any of that related to cultural resource -- the
20 cultural resource impacts of the Coal Hollow Mine?
21 MR. HADDOCK: No.

Informal Hearing Transcript, Testimony of Daron Haddock (April 30, 2010) at 277 Ins 17-21.

Hollow Mine could have on the Panguitch National Historic District. Pet. Br. at 20-22.

One resident who owns a historic home one block from Highway 89, for example, expressed concern about the increased truck traffic, the vibrations and noise that would occur if the mine was approved. Email from Donna Owens to Daron Haddock (May 22, 2008) [P-11] (pulled from Permit Record CD [D-1]:

CO250025\2008\INCOMING\0096.pdf). Thirty-seven residents and business owners wrote to the Division requesting analysis of the impacts of the proposed mine on the Panguitch National Historic District. Bobbi Bryant et al. re. Alton Coal Development (June 20, 2008) (pulled from Permit Record CD [D-1]:

CO250025\2008\INCOMING\0124.pdf). Numerous concerns were raised at the public hearing that the Division held on the permit regarding the potential adverse effects on the Panguitch National Historic District. Before the Division of Oil, Gas and Mining, *In the Matter of the Permit Application for Alton Coal Development, L.L.C.'s Coal Hollow Mine C/025/0005 Kane County, Utah, Informal Conference Transcript* (June 16, 2008) (pulled from Permit Record CD [D-1]: CO250025\2008\INCOMING\0142.pdf) at 22-23 (comments of Bobbi Byrant), 26 (comments of Luella McMahan), 30 (comments of Becky Yard), 33 (comments of Barbara Allison).

ACD had an affirmative duty to address the potential impacts of the mine on the Panguitch National Historic District. UT ADC R645-301-411.140. Likewise, the Division had an affirmative duty to assess whether the proposed mine would “adversely affect any publicly owned park or any place included in the National Register of Historic Places.” UT ADC R645-103-236. If the mine would adversely affect the Panguitch National Historic District, the Division could only move forward to approve the mine if

the SHPO concurred in such approval. *Id.* See also, 30 U.S.C. § 1272(e)(3); 30 C.F.R. § 761.11(c). The Division cannot meet this obligation where it has not evaluated the impacts on Panguitch or sought the SHPO's concurrence on its treatment of Panguitch. According to the Division itself, it did not address the concerns raised about Panguitch but instead passed these comments on to the Division of Transportation. Joe Helfrich, Technical Memorandum (May 29, 2008) [D-18] at 2:

The town of Panguitch is not considered an adjacent area under R645-301.411-130 or R645-301-320. The Division will forward comments concerning the potential impacts to the town of Panguitch caused by the influx of coal truck traffic and to streams such as Mammoth and Assay creeks that intersect the proposed transportation corridor to the Department of Transportation.

Division Permit Supervisor Daron Haddock explicitly stated that the Division had not provided any information to the State Historic Preservation Office regarding the impacts of the mine on the Panguitch National Historic District:

Q. Did the division provide any information to the State Historic Preservation Office related to the impacts of the mine on the Panguitch National Historic District?

A. No.

Excerpts of Rule 30(b)(6) Deposition of Daron Haddock (Feb. 22, 2010) at 51.

Relying on analysis completed later pursuant to the National Environmental Policy Act ("NEPA") will not prevent the adverse effects that could result from the Division's approval of the Coal Hollow Mine permit. The Division cites to the analysis of the Panguitch National Historic District that will occur pursuant to the Cultural Resource Management Plan ("CRMP") as part of the federal coal lease applications. Div. Br. at 15 (citing Montgomery Archeological Consultants, Cultural Resource Management Plan Draft 2 (May 23, 2008) [D-16]). Nothing, however, prevents the Coal

Hollow Mine from opening before the NEPA analysis for the federal coal is completed. The mine is to open on private land mining private coal as approved by the Division on October 19, 2009. The trucks will begin to flow through the Panguitch National Historic District upon the opening of the mine on private land as approved by the Division. Nothing done later as part of the NEPA process will address the adverse effects upon the Panguitch National Historic District from the Coal Hollow Mine as approved by the Division that residents and the National Park Service identified.

As explained herein and in Petitioners' Post Hearing Brief dated May 12, 2010, the Division has an independent obligation under its own regulations to assess the impacts of the proposed mine on the Panguitch National Historic District. The Division failed to undertake that analysis. Consequently, its approval of the Coal Hollow Mine permit on October 19, 2009 was unlawful and should be remanded to the Division for further consideration.

CONCLUSION

For the reasons stated herein and in Petitioners' Post-Hearing Brief dated May 12, 2010, Petitioners request that the Board find the Division's approval of the Coal Hollow Mine permit application unlawful and remand it to the Division for further consideration. The Board should complete its review of the hydrology and geology issues prior to remand.

Dated: May 18, 2010

Respectfully submitted,

By: /s/ Sharon Buccino

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2010, I served a true and correct copy of **PETITIONERS' RESPONSE BRIEF ADDRESSING AIR QUALITY AND CULTURAL/ HISTORIC ISSUES** to each of the persons listed below via e-mail transmission.

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